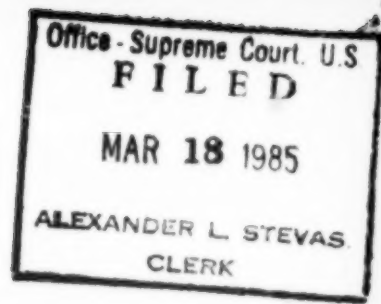


No. 84-351

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984



ATASCADERO STATE HOSPITAL
and CALIFORNIA DEPARTMENT
OF MENTAL HEALTH,

Petitioners,

vs.

DOUGLAS JAMES SCANLON,

Respondent.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

INTRODUCTION

Time and space limitations do not allow for a detailed treatment of each of the arguments offered by respondent and *amici*. Petitioners have attempted in the following to discuss at least the principal points raised in the opposing briefs.

II

NEITHER THE STATUTORY LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE REHABILITATION ACT REVEAL AN UNEQUIVOCAL INTENT TO ABROGATE STATES' IMMUNITY

1. Inclusion of States Within the Coverage of the Rehabilitation Act and the Implication of a Private Remedy Are Propositions Which Are Not Directed Toward the Essential Issue Before the Court

Respondent devotes much of his brief to establishing propositions which are either not contested herein or miss the mark as to the essential issue before this Court.

For example, respondent refers extensively to remarks in the Congressional Record and to portions of Committee hearings and reports for the purpose of establishing an understanding and intent on the part of Congress to include States within the ambit of section 504 of the Act. (Rehabilitation Act of 1973, 87 Stats. 394, as amended, 29 U.S.C. §794.) Respondent also notes that this Court in *Consolidated Rail Corp. v. Darrone* (1984) ____U.S____, 104 S.Ct. 1248, 1255, n. 16, declared that by its 1978 amendments to the Act Congress codified existing regulations, which, in turn, define recipients to include States (45 C.F.R. Pt. 84.3(f)). (Resp. Br. pp. 6-14.)

These references demonstrate nothing more than precisely what they say — that States are included within the general terms of the Act. This is not an observation which is challenged by petitioners. The point of contention,

however, is what *are* the terms of the Act. Respondent's arguments steer away from that inquiry.

It bears repeating, therefore, that the inquiry to be addressed in the instant case is whether the Rehabilitation Act of 1973 by clear language on its face indicates Congressional intent to sweep away States' Eleventh Amendment immunity. *Quern v. Jordan* (1979) 440 U.S. 332, 345.

In affirming this standard of clear language, the Court in *Quern* quoted from and relied upon the decision in *Employees v. Missouri Public Health Dept.* (1973) 411 U.S. 279. The *Employees* case is one closely analogous to the case at bar and bears particular discussion because it demonstrates the tangential nature of respondent's argument respecting States being covered under the Rehabilitation Act.

In *Employees* the Court was called upon to examine a claimed abrogation of States' immunity under the Fair Labor Standards Act. Section 16(b) of that Act specifically authorized a private cause of action in any court of competent jurisdiction against any employer which was covered by and in violation of the Act.

Section 3(d) of the FLSA expressly included States as employers within the ambit of the Act's coverage, leaving the Court to preliminarily conclude:

"By reason of the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act." 411 U.S. at p. 283.

Yet, notwithstanding this explicit inclusion of States as employers under the Act and the express authorization of a private remedy against any employer in all courts, this

Court found that no abrogation of States' immunity under the Eleventh Amendment had been effected.

As identified by the Court, when the issue is whether sovereign immunity has been abrogated by Congress, the inquiry is not whether States are subject to the Act in general. Rather, the pertinent inquiry must focus on "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in federal court." 411 U.S. at p. 283.

In the *Employees* case the Court was unable to find in the statutory language before it any clear language that States' constitutional immunity had been swept away and refused to presume such intent on the part of Congress in the absence of such expression. 411 U.S. at pp. 284-285.

The statutory language in the Rehabilitation Act is even less pervasive than that reviewed in *Employees*. Although States are included by regulation within the definition of "recipients," the Act itself does not explicitly provide for a private remedy, in federal or any other court.

Thus, it avoids the true issue here for respondent to expend his energy in an effort to demonstrate that States are recipients under the Rehabilitation Act. The same can be said as to his discussion on the existence of an implied private remedy under the Act. Not only has that point remained uncontested in these proceedings,¹ but any such

¹ Respondent (Resp. Br. p. 19) and *amicus* (ACLU Br. p. 13, n. 17) allude to an *amicus* brief filed by the State of California in *Southeastern Community College v. Davis* (1979) 442 U.S. 397, as evidencing an inconsistency in the position of the present State defendants on the question of Eleventh Amendment immunity. Such a suggestion is clearly spurious since sovereign immunity was not an issue addressed by the parties in that case and, perforce, as *amicus*, California did not and was in no position to raise or discuss that prospect.

demonstration again fails to focus on the critical issue here. (Resp. Br. pp. 18-23.)

None of the arguments or references offered by respondent serves to answer the essential question — did Congress consider and firmly decide to abrogate the Eleventh Amendment immunity of the States? *Quern v. Jordan*, *supra*, 440 U.S. at p. 345.

This Court's decisions have consistently required that if such abrogation is intended, it must be explicitly so stated in the relevant statutory language. *Pennhurst State School & Hosp. v. Halderman* ("Pennhurst II") (1984) ____U.S____, 104 S.Ct. 900, 907; *Quern v. Jordan*, *supra*; *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 451-452; *Edelman v. Jordan* (1974) 415 U.S. 651, 672; *Employees v. Missouri Public Health Dept.*, *supra*.

The Rehabilitation Act is silent concerning abrogation of States' immunity. Moreover, even if one is permitted to search the legislative materials, as respondent has apparently extensively done, not a single reference is found therein evidencing Congressional consideration of States' Eleventh Amendment immunity and a determination to sweep away that immunity.

2. The Remedial Provisions of the Rehabilitation Act Represent Exercises of Congress' Spending Power. Irrespective of the Power Employed, However, Congressional Intent to Abrogate States' Immunity Must Be Explicit

Respondent and *amicus* also devote considerable discussion to the question of what power Congress exercised in enacting the relevant portions of the Rehabilitation Act. (Resp. Br. pp. 14-17; ACLU Br. pp. 4-5.) They submit that section 5 of the Fourteenth

Amendment was the font of authority. Petitioners have argued that the constitutional source was the Spending Clause. (Pet. Br. pp. 67-71.)²

Petitioners agree that determining the source of power relied upon by Congress in any given legislation does not admit of easy resolution. There has not been extensive treatment in the case law on this question. The only decision of this Court, however, which addresses this issue in the context of a statute analogous to the Rehabilitation Act does provide some guidance.

The Court in *Consolidated Rail Corp. v. Darrone*, *supra*, at p.1250, observed that the anti-discrimination language employed in section 504 is virtually identical to that of section 601 of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. § 2000d). Both statutes proscribe discrimination under any program or activity receiving federal financial assistance. Indeed, respondent throughout his brief relies on this link between the two statutes in

² It is stated by respondent that petitioners conceded in both the District Court and Appellate Court that section 504 represented a Fourteenth Amendment exercise. This statement is both inaccurate and misleading. The reference to the record (C.R. 12 at 3) which respondent cites in this regard is to a six-page reply memorandum of points and authorities filed by petitioner in the District Court in January 1980. This, of course, was considerably prior to petitioners' having had the benefit of this Court's discussions respecting Fourteenth Amendment exercises vis a vis those under the Spending Clause in *Guardians* (1983), *infra*, and *Pennhurst I* (1981), *infra*. Moreover, neither of petitioners' briefs filed in the Ninth Circuit assumed that Congress had utilized the Fourteenth Amendment. Changes in legal theory, in any event, do not represent the introduction of new "issues," as contended by respondent (Resp. Br. p. 17, fn.26), particularly when the question was a point of dispute throughout the appellate proceedings.

positing his arguments concerning the breadth and scope to be accorded section 504.

In *Guardians Ass'n. v. Civ. Serv. Com'n. of City of New York* (1983) ____ U.S. ____, 104 S.Ct. 3221, 3230, this Court held that section 601 of Title VI represented Spending Power legislation:

"It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' ... (Citation omitted.)"

Other than a singular reference to identical comments by Senators Cranston and Stafford respecting the recovery of attorney's fees (Resp. Br. p.16), which petitioners have previously distinguished (Pet. Br. pp. 75-77), the legislative record contains no reference to utilization of Fourteenth Amendment power in connection with the Act. While this Court has indicated that it will not require Congressional declarations of this nature in testing the constitutionality of an enactment, *EEOC v. Wyoming* (1983) 460 U.S. 226, 243-244, n. 18, neither will it presume an exercise of Fourteenth Amendment power in order to validate a proffered construction of a statute. *Pennhurst State School v. Halderman* ("Pennhurst I") (1981) 451 U.S. 1, 16.

Petitioners are not unmindful of the references in the Congressional Record to the effect that section 504 "guarantees the civil rights of the handicapped" and "provides equal education and employment opportunities" for same. These phrases, though, must be balanced against the fact that Congress elected to declare those rights and to proscribe their deprivation only as to those programs and activities receiving federal funds. In other words, as with Title VI, Congress limited its scope to restrict only those who were the grantees of an exercise of its Spending Clause

power. Thus limited, the statute would seem indicative of an exercise of only Spending Clause power, as opposed to an all-inclusive proscription under the Fourteenth Amendment.

Even if the relevant provisions of the Rehabilitation Act are an exercise of section 5 of the Fourteenth Amendment, the Act still fails to abrogate States' immunity. *Edelman*, *Fitzpatrick* and *Quern*, *supra*, each of which concerned Fourteenth Amendment legislation, all confirmed the requirement of express statutory abrogation. (See, Pet. Br. p.68.)

Respondent and *amici* continue to make too much of this Court's holding in *Hutto v. Finney* (1978) 437 U.S. 678, in suggesting that it supports application of a different rule. In finding abrogation of States' immunity for purposes of attorney's fees awards, the Court was influenced by three factors not present in the instant case.

First, the relief at issue in *Hutto* involved attorney's fees, which the Court characterized as costs, which "have traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Id.* at p.695. The respondent here, however, seeks, among other relief, damages for prelitigation conduct, precisely the kind of extension of its decision against which the *Hutto* majority cautioned. *Id.* at pp. 695, 697, n.27.

Secondly, the Act examined in *Hutto* provided a legislative history which focused directly on the immunity problem posed by the Eleventh Amendment and which revealed at least two occasions where Congress expressly rejected attempted amendments of the Act aimed at immunizing States. The Rehabilitation Act, in contrast, provides no such history. To the contrary, when Congress effected amendments to the Act in 1978 it declined to

address the immunity issue despite the fact that the only court decision to decide the question in the analogous context of Title VI, *Gilliam v. City of Omaha* (D. Neb. 1975) 388 F.Supp. 842, 847, affirmed without mention of remedies (8th Cir. 1975) 524 F.2d 1013, upheld the Eleventh Amendment.

Finally, the majority in *Hutto* was persuaded by the prospect that to disallow fees against States would render the subject statute meaningless. *Id.* at p.698, n.31. Respondent has made the same argument here with respect to damages (Resp. Br. p. 28), but his contention rings hollow. Given the stated goal of the Rehabilitation Act, to promote and expand employment opportunities for the handicapped, *Consolidated Rail Corp. v. Darrone, supra*, 104 S.Ct. at p. 1255, provisional relief is certainly the more apt remedy. To assert that the non-availability of damage actions against States in federal court renders the Act meaningless is to ignore also the remedies available through government enforcement, suit in state court and injunctive actions against state officials in federal courts. (See, *Pennhurst II, supra*, 104 S.Ct. 900, 919-920; *Employees v. Missouri Public Health Dept., supra*, 411 U.S. at p.287.)

Thus, neither the nature of the relief at issue nor the other aforementioned considerations which influenced the result in *Hutto* have application to the present case. The requirement of express abrogation set forth in *Edelman* and its progeny controls the inquiry in the present case, irrespective of the source of Congress' power. Such a requirement stems from sound policy considerations, which the Eleventh Amendment itself embodies, and which recognize the vital role of the doctrine of sovereign immunity in our federal system, *Pennhurst II, supra*, 104 S.Ct. at p.907, and ensures that attempts to limit States'

power are unmistakable. *Hutto v. Finney*, *supra*, 437 U.S. at p. 706 (separate opinion of J. Powell, joined in by The Chief Justice, concurring in part and dissenting in part).

III

CALIFORNIA HAS NOT WAIVED ITS IMMUNITY OR CONSENTED TO SUIT BY VIRTUE OF STATE LAW

Respondent asserts, for the first time, that California, by consenting to suits against it in its own courts or waiving immunity to suits in its courts, has consented to suits brought against it in federal courts. (Resp. Br., pp. 29-32.) This contention, although appearing for the first time in this suit, is neither novel nor is it valid.

Central to respondent's argument is reliance on Article III, section 5 of the California Constitution and *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211; 359 P.2d 457.

In *Muskopf*, *supra*, the California Supreme Court invalidated common law tort immunity in this State. (*Id.*, pp. 213-217.) In conclusion the majority observed that:

“...[I]n holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past....”

Contrary to respondent's assertions, *Muskopf* did not sweep away all governmental immunity. *Muskopf* did end judicially created tort immunity, but not other immunities, such as the bar of the Eleventh Amendment to suit in federal court, to which *Muskopf* never alluded.

It has long been established that a State's waiver of its Eleventh Amendment immunity will not be lightly inferred

by the federal courts. This Court established the standard early in this century in *Murray v. Wilson Distilling Co.* (1908) 213 U.S. 151, when it held that a waiver of Eleventh Amendment immunity:

“...could only be warranted if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.” (*Id.*, 171.)

Although the *Murray* standard of explicitness was announced by this Court in respect to legislation, there is no logical reason why a court created waiver should not be held to the same standard. Since *Muskopf* only discussed common law tort immunity, it should not lightly be construed to effect the constitutional immunity embodied in the Eleventh Amendment. Certainty of expression should govern the restrictions placed on constitutional guarantees, both by the Legislature and the Judiciary.

Respondent's reliance on Article III, section 5 of the California Constitution, thus, is not helpful to his position. That provision states:

“Suits may be brought against the State in such manner and in such courts as shall be directed by law.”

In construing that language, the California Supreme Court in *Muskopf* stated:

“On its face, it seems to say that the State may be held liable when suits are brought against it in accordance with a legislatively prescribed procedure. Consistent, however, with our previous construction of essentially identical statutory language, we held that Article XX, Section 6, provides merely for a legislative consent to suit.” (*Muskopf, supra*, at p.218.)

Although the California Supreme Court appeared to minimize the importance of having a legislative waiver of judicially created tort immunity, *Muskopf* can only be read to mean that as to other, non-judicially created immunity, only the State Legislature can waive such immunities by appropriate legislation.

In retreat, respondent asserts that California has waived, by legislation, its Eleventh Amendment immunity.³ (Resp. Br., p.31.) Relying on California Government Code section 12965(b), dealing with *State* created remedies for employment discrimination, respondent fails to address the context and scope of that legislation and, in particular, subdivision (b), which states:

“(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue the department shall promptly notify, in writing, the person claiming to be aggrieved. Such notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization or employment agency named in the verified complaint within one year from the date of such notice. *The superior, municipal, and justice courts of the State of California shall have jurisdiction of such actions, and the aggrieved person may file in any of these courts ... Such actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to*

³ Petitioners have already discussed the inapplicability of an implied waiver by virtue of petitioners' alleged receipt of federal funds and will not repeat same here. (See, Pet. Br., pp. 63-65.)

be aggrieved where such persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants ..."
(Emphasis added.)

A fair reading of section 12965(b) requires a finding that the Legislature has invested the State Courts with jurisdiction to determine civil disputes encompassed by the State's fair employment legislation. (Cal. Gov. Code, § 12940 et seq.) Petitioners have acknowledged that this act provides a remedy against State employers in State Courts. The respondent limits his discussion to the last quoted sentence of subdivision (b). The actions referred to in that sentence relate back to the actions which may be filed in State Courts earlier in the subdivision. No intent, and certainly no clear legislative expression to waive Eleventh Amendment immunity can be gleaned from section 12965(b) when read in context.

Mere waiver of State immunity from suit in its own courts is insufficient to waive immunity from suit in federal court. (*Chandler v. Dix* (1904) 194 U.S. 590, 591; *Great Northern Ins. Co. v. Read* (1943) 322 U.S. 47, 55; *Petty v. Tennessee-Missouri Comm'n.* (1959) 359 U.S. 275, 276-277; and *Edelman v. Jordan*, *supra*, 415 U.S. at p. 677, n. 19.)

Lastly, respondent asserts that *Maurice v. State of California* (1944) 43 Cal.App.2d 270, 110 P.2d 706, and *Hall v. University of Nevada* (1973) 8 Cal.3d 522, 503 P.2d 1363, require a finding that the State has waived its immunity. Reliance on these cases is misplaced inasmuch as both actions arose in State Court and never involved immunity under the Eleventh Amendment.

IV

APPLICATION OF A CLEAR STATEMENT RULE TO THE REMEDIAL PROVISIONS OF THE REHABILITATION ACT IS NOT IMPERMISSIBLY RETROACTIVE

In the *amici* brief filed on behalf of Senator Cranston, et al., it is urged that requiring an express abrogation under section 504 impermissibly applies a standard which was not in effect at the time that statute was enacted. Such an argument misses the most salient point. The express abrogation requirement announced in *Employees, supra*, *Edelman, supra*, and *Fitzpatrick, supra*, was firmly entrenched in sovereign immunity law at the critical point in time, 1978, when Congress chose to provide aggrieved beneficiaries of the Act the remedies, procedures and rights set forth in Title VI by adding section 505(a)(2) to the Act.

Having claimed that Congress relied on *Parden v. Terminal R. Co.* (1964) 377 U.S. 184 as the reigning theory on immunity when section 504 was enacted, *amici* cannot now disclaim knowledge of the reigning theory, as found in *Employees, Edelman* and *Fitzpatrick*, when it took action in 1978 to provide relief for violations of section 504.

Furthermore, the reliance placed on the *Parden* decision would have been unfounded. While the Court in that case declined to require express inclusion of States as covered "employers" under the Federal Employers' Liability Act, it did so under admittedly unique circumstances. The Court alluded to the *unique* legislative and case law precedent respecting governmental control over interstate rail carriers, by virtue of which the Court felt constrained to

find a waiver, setting that case apart from all others on the issue of waiver:

“ The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included. [*California v. Taylor* (1957)] 353 U.S., at 564.’

“...Thus we could not read the FELA differently here without undermining the basis of our decision in *Taylor*.” 377 U.S. at 189. (Insert added.)

The Court in *Parden* was also influenced by its concern that an exemption of States from liability would have rendered the remedy provided under the FELA meaningless, *Id.*, at p.190, and by the fact that the activity at issue was of a “commercial” nature. *Id.*, at pp. 196-198.

That the *Parden* decision stands as a unique and isolated exception to the settled rule on waiver of immunity has been noted by this Court:

“...The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity can be put to one side.” *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. at 285.

In *Petty v. Tennessee-Missouri Comm’n.* (1959) 359 U.S. 275, also cited by *amici*, the Court simply found that the defendant States had expressly consented to suit by executing a compact which contained a specific Congressional condition that the parties so consent.

Thus, the reigning theory on abrogation of immunity concerning statutes which did not present the unique circumstances of *Parden* and *Petty* was more aptly described in the dissenting opinion in *Parden*:

‘[W]aiver of sovereign immunity will be found only where stated by ‘the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction’. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-470.” 377 U.S. at pp. 199-200.

The fact that there is even a dispute as to what was the applicable standard on abrogation at a given point in time serves to demonstrate the encroachment on States’ sovereignty inherent in *amici*’s underlying postulation. That proposition seems to be that Congress, alone, should determine whether abrogation should be attempted and it, alone, should decide whether it has, in fact, done so effectively.

It is the latter part of this proposition which creates a paradox. Although *amici* attempts to draw a distinction between “interpretive” and “prescriptive” approaches to describe this Court’s Eleventh Amendment decisions, the distinction is a self-created and ambiguous one. For, if the judiciary declines to examine legislation for the necessary Congressional intent, it not only abdicates its role under the Constitutional plan, but by finding abrogation absent clear language the Court performs the very function which *amici* seek to restrict. The Court becomes the ultimate policy-maker on questions of immunity.

To the contrary, by requiring a clear expression of intent to abrogate, the determination to subject States to suit is left

in Congress where *amici* would have it. The Court's role, then, is to declare whether that determination has, in fact, been made by Congress.

On the other hand, when Congress fails to clearly express its intent, it shifts the critical policy determination to the courts. This shifting, which *amici* asserts constitutes an impermissible assumption by the courts of the legislative function, is obviated if Congress merely enacts legislation which puts everyone on notice, including the courts, as to what its intentions are respecting abrogation.

"*Edelman* ... is not so restrictive that Congress may not mitigate its impact by unambiguously conditioning state participation in federal programs on a waiver of the Eleventh Amendment defense." *Florida Dept. of Health v. Fla. Nursing Home Assn.* (1981) 450 U.S. 147, 153 (opinion of J. Stevens, concurring).

Absent such clarity in the subject legislation, the Court has refused to sweep away States' immunity. "Article III confers no jurisdiction on this Court to strip an explicit Amendment of the Constitution of its substantive meaning." *Pennhurst II*, *supra*, 104 S.Ct. at p.912, n.17.

The extent to which respondent and *amici* have searched and referred to the legislative materials in attempting to supply the requisite Congressional intent demonstrates the practical justification for the express language requirement. This is particularly so where the legislation stems from the Spending Power, which this Court has declared to be in the nature of a contract. *Pennhurst I*, *supra*, 451 U.S. at p. 17. Accordingly, if Congress intends to impose a condition on the grant of federal funds (such as waiver of sovereign immunity), it must do so unambiguously. *Id.*

States must not be required to conduct examinations of the Congressional Record, transcripts of Committee hearings and Committee reports in order to determine whether its participation in a program will constitute a forfeiture of its Constitutional immunity. Rather, clear notice of all conditions which attach to its participation should be provided by Congress. *Id.*, at p.25.

V

**RECONSIDERATION OF THE DECISION
IN *HANS V. LOUISIANA* IS INAPPROPRI-
ATE AND UNNECESSARY IN THIS CASE**

Raising an issue not necessary to a resolution of the question presented by petitioners and not mentioned in any of the proceedings below, respondent urges as an argument of last resort that this Court reexamine and overrule the decision in *Hans v. Louisiana* (1890) 134 U.S. 1 "insofar as it limits federal court jurisdiction over federal question cases." (Resp. Br., p. 33.)

The question presented in the instant petition neither raised this issue nor requires a reconsideration of *Hans* in order for there to be a resolution herein. Whether the Rehabilitation Act constitutes an effective abrogation of sovereign immunity is a question which can and should be decided in accord with settled and accepted principles of Eleventh Amendment law, upon which the parties and courts below have relied, not upon a belated effort to upset those principles and reinvent immunity doctrine.

In anticipation of the possibility of respondent's urging such a position, in petitioners' opening brief we requested that if this Court resolves to reconsider the longstanding

precedent of *Hans* it should set the issue for separate briefing and argument. (Pet. Br., pp. 81-82.) Such a suggestion is echoed by *amicus*. (ACLU Br., p. 17.)

VI

CONCLUSION

The decision of the Court of Appeals should be reversed.

DATED: March 15, 1985

Respectfully submitted,

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